CCA Holdings Ltd v Palm Resort Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S5-22-289 OF 1998
JAMES FOONG J
29 JUNE 1998

Civil Procedure *— Injunction — Interlocutory injunction — Application for — Claim for loss of reputation and credibility — Damages was adequate remedy — Financial ability to pay if found liable for breach — Whether injunction should be granted*

Contract *— Breach — Claim for loss of reputation and credibility — Whether recoverable under s 74 of the Contracts Act 1950*

The plaintiffs were managers of the defendants' club ('the club') under a technical assistance and managerial agreement ('the agreement'). On 13 April 1998, the defendants gave to the plaintiffs notice to terminate the agreement on the ground that the club had not generated an operating profit as required in the agreement. The plaintiffs then filed an application for injunctions to restrain the defendants from removing them as managers of the club. Counsel on both sides argued as to the meaning of the words 'operating profit'. The plaintiffs alleged that damages was an inadequate remedy and that such manner of termination of their services would have adverse impact on their goodwill and reputation as managers of prestigious clubs internationally. Counsel further argued that the injunctions so sought should be granted without even having to apply the principles enunciated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The defendants, on the other hand, alleged that they had the right to terminate the services of the plaintiffs and that non-pecuniary damages could not be claimed under a cause of action for breach of contract.

Held, dismissing the plaintiffs' application with costs:

(1) When the dispute between the parties centers upon the interpretation of words, with creditable presentations of views in favour of both sides, it is far from clear to warrant a departure in the application of the standard test expounded in *American Cyanamid* to give a summary judgment to the plaintiffs (see p 147F–G); *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 followed; and *Lee Ying Piew & Ors v MP Tan Electrical & Credit Sdn Bhd* [1989] 3 MLJ 228 distinguished.

(2) Damages for loss of reputation and credibility is not recoverable in Malaysia under s 74 of the Contracts Act 1950 which substantially affirms the common law position (see pp 148B–G, 149G–I and 150A); *Addis v Gramophone Co Ltd* [1909] AC 488 and *BD Systems & Software Sdn Bhd v KLSE Chilong Systems Sdn Bhd* [1997] Mallal's Digest para 587 followed. Under such circumstances, where damages is an adequate remedy and the defendants are financially able to pay, if found liable to have

breached the agreement, the court would decide against the granting of the interlocutory injunctions however strong the plaintiffs' claim appears to be (see p 150G).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pengurus kelab defendan-defendan ('kelab tersebut') di bawah suatu perjanjian bantuan teknikal dan pengurusan ('perjanjian tersebut'). Pada 13 April 1998, defendan-defendan telah memberikan notis kepada plaintif-plaintif untuk menamatkan perjanjian tersebut atas alasan bahawa kelab tersebut tidak menjanakan keuntungan pengendalian seperti yang dikehendaki dalam perjanjian tersebut. Plaintif-plaintif kemudiannya memfailkan satu permohonan untuk injunksi bagi menahan defendan-defendan daripada memecat mereka sebagai pengurus kelab tersebut. Peguam kedua-dua pihak berhujah atas maksud perkataan 'keuntungan pengendalian'. Plaintif-plaintif mengatakan bahawa ganti rugi adalah remedi yang tidak memadai dan bahawa cara penamatan perkhidmatan yang sedemikian akan mempunyai kesan yang buruk pada nama baik dan reputasi mereka sebagai pengurus kelab-kelab antarabangsa yang unggul. Peguam selanjutnya menghujahkan bahawa injunksi yang dipohon sepatutnya diberikan tanpa keperluan untuk memakai prinsip-prinsip yang dinyatakan dalam *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Sebaliknya, defendan-defendan mengatakan bahawa mereka berhak menamatkan perkhidmatan plaintif-plaintif dan bahawa ganti rugi bukan berbentuk wang tidak boleh dituntut di bawah suatu kausa tindakan untuk kemungkiran kontrak.

Diputuskan, menolak permohonan plaintif-plaintif dengan kos:

(1) Di mana pertikaian di antara pihak-pihak ditumpukan pada tafsiran perkataan-perkataan, dengan pengemukaan pandangan yang memihak kepada kedua-dua pihak, ia tidak mewajarkan penyimpangan dalam pemakaian ujian standard yang dinyatakan dalam *American Cyanamid* untuk memberi penghakiman terus kepada plaintif-plaintif (lihat ms 147F–G); *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 diikut; dan *Lee Ying Piew & Ors v MP Tan Electrical & Credit Sdn Bhd* [1989] 3 MLJ 228 dibeza.

(2) Ganti rugi untuk kehilangan reputasi dan kebolehpercayaan tidak boleh dipohon di Malaysia di bawah s 74 Akta Kontrak 1950 yang pada dasarnya mengesahkan kedudukan common law (lihat ms 148B–G, 149G–I dan 150A); *Addis v Gramophone Co Ltd* [1909] AC 488 dan *BD Systems & Software Sdn Bhd v KLSE Chilong Systems Sdn Bhd* [1997] Mallal's Digest perenggan 587 diikut. Di bawah keadaan sedemikian, di mana ganti rugi merupakan remedi yang memadai dan defendan-defendan mampu membayar sekiranya didapati bertanggungjawab kerana telah melanggar perjanjian tersebut, mahkamah akan memutuskan

terhadap pemberian injunksi interlokutori tak kira betapa kukuhnya tuntutan plaintif-plaintif (lihat ms 150G).]

Notes

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1611–1693.

For cases on interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2112–2180.

Cases referred to

Addis v Gramophone Co Ltd [1909] AC 488 (folld)

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Arif v Yeo & Anor [1990] 1 MLJ 218 (refd)

BD Systems & Software Sdn Bhd v KLSE Chilong Systems Sdn Bhd [1997] Mallal's Digest para 587 (folld)

Hadley v Baxendale (1854) 9 Exch 341 (refd)

Haron bin Mundir v Singapore Amateur Athletic Association [1992] 1 CLJ 284 (refd)

High Mark (M) Sdn Bhd v Pacto Malaysia Sdn Bhd [1987] 2 MLJ 85 (refd)

Lee Ying Piew & Ors v MP Tan Electrical & Credit Sdn Bhd [1989] 3 MLJ 228 (distd)

Tham Cheow Toh v Associated Metal Smelters Ltd [1972] 1 MLJ 171 (refd)

Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)

Legislation referred to

Contracts Act 1950 s 74(1), (2)

Leong Wai Hong (*Skrine & Co*) for the plaintiff.

Andrew Wong Fook Hin (*SY Ng* with him) (*Andrew Wong & Co*) for the defendant.

James Foong J: The plaintiffs are managers of the defendants' club known as Palm Resort Golf and Country Club ('the club') under a technical assistance and managerial agreement dated 1 May 1993 ('the agreement'), entered into between the plaintiffs and the defendants.

The initial period of the plaintiffs' term of engagement was for 10 years with subsequent renewal provided for in the agreement.

On 13 April 1998, the defendants gave to the plaintiffs a one month's notice in writing ('the notice') to terminate the agreement. This means, effectively, the plaintiffs' services will terminate on 14 May 1998. The reason given in the notice is:

> By reason of the matters set out in para (4) above and in pursuant to cl 7.03 of the agreement.

Paragraph (4) states:

> Based on the last audited figures as at 31 December 1996, Palm Resort Golf and Country Club has not generated an operating profit on or after 31 May 1995.

And cl 7.03 of the agreement is listed as:

> Termination by owners
>
> In the event that the club does not generate an operating profit on or after 31 May 1995, the owner shall be entitled to terminate this agreement by giving one month's written notice to CCA [the plaintiffs].

Dissatisfied and disputing this allegation, the plaintiffs filed an ex parte application for:

(a) an interim injunction to restrain the defendants from removing them as managers of the club; and

(b) a mandatory injunction to reinstate them as managers.

Under the direction of the court, this application of the plaintiffs was made inter partes.

On 25 May 1998, while consenting to the defendants filing their affidavits-in-reply, an interim order was agreed by the parties. It permits the status quo of the parties as at 25 May 1998 to be maintained until final disposal of this application.

The main contention of the parties

In their affidavits, the defendants are alleging that they have the right to terminate the services of the plaintiffs before the expiration of the initial term. They base their ground on the allegation that the plaintiffs have failed to generate a 'gross operating profit' as stipulated in cl 7.03 of the agreement. Though admitting that the word 'gross' is not attached to the phrase 'operating profit' as found in cl 7.03, the defendants insist that it must mean gross operating profit and not just basically operating profit. To support this point of view, cl 3.062 of the agreement was highlighted where the term 'gross operating profit' is used. Here, for the purpose of deciding a 'profit incentive fee' (another consideration under the agreement which the defendants were obliged to pay the plaintiffs), factors listed in exh A attached to the agreement are to be used. Essentially, by taking the determinants in exh A, 'gross operating profit' will exclude entrance, or initiation fees received from applicants joining the club. Without the inclusion of this item, there will be a loss in the operating profit of the club for the period 31 December 1996.

Obviously, the plaintiffs disagree with this interpretation. They argued that cl 7.03 does not mention the word 'gross'; it explicitly states 'operating profit'. Thus exh A should not be used as formulation to define 'operating profit', and the definition of 'gross operating profit' found in cl 3.062 is of no application to assist in defining 'operating profit' in cl 7.03.

A *Analysis*

From the agreement disclosed above, I am convinced that the plaintiffs' case is not frivolous or vexatious. There is a serious question to be tried. As distinctly stated by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396:

B

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations.

C However, Mr Leong, counsel for the plaintiffs did not seem satisfied with this. He adopted another approach by attempting to persuade me that the circumstances of this case are so clear that the injunctions so sought by the plaintiffs should be granted without even having to apply the principles enunciated in *American Cyanamid*'s case. This proposition is adopted, I believe, under the influencing passage of Peh Swee Chin J's (as he then D was) judgment in *Lee Ying Piew & Ors v MP Tan Electrical & Credit Sdn Bhd* [1989] 3 MLJ 228 where he said (at p 231):

> ... ie that the landlord's claim to possession on the undisputed expiry of the term of tenancy was so clear that the court ought to decide and did decide it at once in favour of the landlords. Such being the case, Lord Diplock's requirements as stated in *American Cyanamid v Ethicon Ltd* about the E applicant for an interlocutory injunction having had to satisfy the court of a serious question to be tried and about pending the trial of such serious question, such applicant having had to satisfy the court on a balance of convenience would become unnecessary for the landlords in the instant case on its special facts.

F With the facts as disclosed, and of which I have highlighted, I cannot accept this contention of Mr Leong. When the dispute between the parties centers upon the interpretation of words, with creditable presentations of views in favour of both sides, it is far from clear to warrant a departure in the application of the standard test expounded in *American Cyanamid* to G give a summary judgment to the plaintiffs.

Proceeding with the test as set out in *American Cyanamid*, the next issue is that of adequacy of damages to be compensated 'for the loss he [plaintiffs] would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the [this] application and the time of the trial. If damages in the measure recoverable H at common law be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage' (Lord Diplock in *American Cyanamid* at p 408).

Supporting their contention that damages is an inadequate remedy, I the plaintiffs stress that such manner of termination of their services by the defendants 'will have adverse impact on their goodwill and reputation' as managers of prestigious clubs internationally. As precedent, Mr Leong advanced the following authorities where the courts have decided that in

matters involving disputes arising from management agreement, damages was an inadequate remedy, thereby favouring the granting of interlocutory injunctions: *High Mark (M) Sdn Bhd v Pacto Malaysia Sdn Bhd* [1987] 2 MLJ 85; *Arif v Yeo & Anor* [1990] 1 MLJ 218.

Mr Wong, counsel for the defendants, however focused on one important aspect of this claim by the plaintiffs. He submitted that 'Damages for loss of reputation or credibility will not as a general rule be awarded for breach of contract'. To support this proposition, the following cases are cited: *Addis v Gramophone Co Ltd* [1909] AC 488; *Haron bin Mundir v Singapore Amateur Athletic Association* [1992] 1 CLJ 284 and *BD Systems & Software Sdn Bhd v KLSE Chilong Systems Sdn Bhd* [1997] Mallal's Digest para 587. In short, he pointed out that since non-pecuniary damages cannot be claimed by the plaintiffs under a cause of action for breach of contract, then their application for the interim injunctions cannot be sustained.

It is necessary, at the outset, to be reminded that the test set forth by Lord Diplock in *American Cyanamid* for the consideration of whether damages is an adequate compensation must be 'in the measure recoverable at common law'. Thus, if damages is not recoverable at common law, then there is no issue on the adequacy of damages to be considered. In the circumstances of this case where the plaintiffs have claimed that damages is inadequate for loss of goodwill and reputation to support the granting of an interlocutory injunction, then the issue centers upon whether such damages can be claimed in a breach of contract in the first place.

There is a distinction between the law of contract and tort. As elaborated by the authoritative works of *Chitty on Contracts, Basic Principles* (27th Ed) para 1-045:

> ... the most basic difference remains that the function of damages in contract is primarily to put the injured party as far as possible in the position in which he would have been had the contract been performed, whereas the function of damages in tort is to put the injured party in the position in which he would have been if the tort had not been committed.

Under the common law, the courts have denied the granting of damages for loss of credibility and reputation. It is my view that goodwill is very much akin to credibility and should be accepted under this same category for consideration in this case. In the leading case of *Addis v Gramophone Co*, the House of Lords refused a servant wrongfully dismissed by his master a claim for injured feelings or for loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment. Lord Atkinson concurring with the majority decision adds that (at p 496):

> In many other cases of breach of contract, there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of

A contract, he lets in all the consequences of that form of action: *Thorpe v Thorpe* (1832) 3 B & Ad 580. One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.

Lord Loreburn LC in a more affirmative note declared that (at p 491):

B If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.

C The principle of this case was followed by Kamalanathan Ratnam JC (as he then was) in *BD System & Software Sdn Bhd v KLSE Chilong Systems Sdn Bhd.*

In the respected text of *McGregor on Damages* (15th Ed) at para 54 (pp 1179–1182), there are, however, three exceptions to this rule. The D first is in an action against a banker for refusing to pay a customer's cheque where he has in his hands funds of the customer to meet it. The second is where there is a mismanagement of the advertising of the plaintiff's business. And the third is where the wrongful dismissal of an actor or a literary figure causes him to a loss of future publicity. The latter two exceptions, in the view of the learned author, after analysing decided cases, is limited to: E 'where publicity was particularly contemplated by the contract, so it might be regarded here as a head of damage contemplated by the parties themselves when entering the contract'. As for the first, Lord Loreburn LC in *Addis v Gramophone Co Ltd* declared that (at p 491):

F The cases relating to a refusal by a banker to honour cheques when he has funds in hands, have in may opinion, no bearing. That class of case has always been regarded as exceptional.

In Malaysia, we of course have the statutory enactment of the Contracts Act 1950. The governing provision on damages relevant to the present issue is s 74(1) and (2), which is as follows:

G Compensation for loss or damage caused by breach of contract

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual cause of things from the breach, or which H the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such a compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

But this section 'substantially affirms the common law laid down in *Hadley* I *v Baxendale* (1854) 9 Exch 341 which was in two parts' (see Ali Hassan FJ in *Tham Cheow Toh v Associated Metal Smelters Ltd* [1972] 1 MLJ 171, and also the Federal Court decision in *Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39). As *Addis v Gramophone Co Ltd* was decided well after *Hadley v Baxendale*, the position of the law in respect of the refusal to

award damages for loss of goodwill and reputation will not be affected by our s 74 of the Contracts Act. A

Proceeding with my analysis, the next question will be whether the plaintiffs fall within the exceptions provided. From the facts stated, one can immediately determine that the plaintiffs are not bankers, and neither are they actors nor those in the literary field. I do not even believe that B their basic business and duty is to attract publicity for themselves. They are club managers and they were engaged as professionals to operate the club efficiently and profitably so that membership will increase and profits will be achieved as targetted. The plaintiffs were not there to sell themselves. Undoubtedly, if they are successful they will gain a reputation. But this is consequential and not the main objective and purpose of why they were C employed. With this, I do not believe that they fall within any of the three exceptions set out in decided cases; as such their claim for loss of goodwill and reputation cannot be recovered for breach of contract.

The question may immediately arise as to why in the cases cited by the plaintiffs, injunctions are granted on the ground that the courts have found D damages to be inadequate in breach of management contracts. To this, I can offer only two explanations. The first is: that this particular issue of loss of goodwill and reputation not being entertained as a damage in the law of contract was not canvassed before the courts. The second is: the emphasis on the loss (goodwill and reputation) was not placed as the primary ground to support a claim of inadequacy of damages in an E application for an interim injunction.

Since damages for loss of reputation and credibility is not recoverable in common law, there is no issue of inadequacy to be considered on this subject. There remain, of course, the recoverable damages in the form of pecuniary loss under the contract if the defendants are found to be in F breach of the agreement. But in this aspect, there is no complaint by the plaintiffs of its inadequacy. Neither is there any assertion of doubt by the plaintiffs that the defendants are in no financial position to pay it if they are found liable. Under such circumstances, where damages is an adequate remedy and the defendants are financially able to pay, if found liable to G have breached the agreement, I have no alternative but to decide against the granting of the interlocutory injunctions however strong the plaintiffs' claim appears to be.

There are still two other issues that need the consideration of this court before conclusion. The first relates to the public interest element. According to the plaintiffs, if their services are terminated, 5,000 existing H members of the club will lose their reciprocal privilege to use the facilities of other clubs, worldwide, managed by the plaintiffs. The defendants though not denying this probability submitted that even before the plaintiffs became managers, a substantial portion of these members had already joined the club. I believe that his disclosure is to impress upon this court I that the majority of the members who joined the club did not base their priority on reciprocal benefits with other clubs run by the plaintiffs, but to use the facilities offered in the club itself.

A The club is primarily a golf club with ancillary sporting facilities. I am inclined to believe that most members paid to join this club for the extensive sporting facilities it offers. The privilege of using affiliated clubs' amenities is, at most, a minor and secondary consideration. Such reciprocal arrangements may be immediately withdrawn if the plaintiffs are no longer managing the club. But, these will soon be overcome with alternate B alignment with other clubs world-wide offering similar activities. It is, after all, the intention of most sporting and social clubs to have reciprocal ties with, as extensive as possible in terms of geographical area, clubs of similar nature. The objective mainly is: to facilitate their own members to continue to use facilities they are accustomed to in an affiliated club when they are C in a different location. These usages and enjoyments are restricted to only a certain period, and never intended to be a total replacement or a permanent addition to what the home club offers. Thus, I am not convinced that this 'public factor' has proved to be of decisive importance in granting the injunctions.

D Finally, there is the assertion by the plaintiffs that once they are no longer managing the club, the calculation of marketing fee as provided under cl 3.063 of the agreement will be difficult to ascertain. Marketing fee under the agreement is to be paid on a monthly basis as an incentive fee of 3% of all membership joining fees and/or deposits received by the club during the month, and this shall continue throughout the E management term.

I cannot accept this plaintiffs' apprehension. With the expertise of accountants and statisticians, projections of the number of members joining the club, if the plaintiffs are no longer managing the club, can be ascertained. With this, a calculation can be made and presented for the court's F consideration on the amount of damages claimed. Of course, any award, if the defendants are found responsible for the breach of the agreement, will be allowed in accordance with s 74 of the Contracts Act. This item of loss cannot be considered inadequate to warrant a granting of the injunctions.

G *Conclusion*

Based on the reasons I have expressed above, I accordingly dismiss this plaintiffs' application with costs.

Plaintiffs' application dismissed with costs.

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Reported by Loo Lai Mee

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